

# TWO SIDES OF THE COMBATANT COIN: UNTANGLING DIRECT PARTICIPATION IN HOSTILITIES FROM BELLIGERENT STATUS IN NON-INTERNATIONAL ARMED CONFLICTS

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## 1. INTRODUCTION

Determining who qualifies as a lawful object of attack in the context of contemporary military operations against non-state belligerents<sup>1</sup> is an increasingly demanding challenge. While it is axiomatic that only persons who qualify as either enemy

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<sup>1</sup> The term 'belligerent' is used throughout this article to designate a member of an armed group who performs the type of function historically performed by lawful combatants who are members of the regular armed forces of a State. See generally Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323 (1951) (describing the legal treatment of those who fall outside of the two traditional classes of persons entitled to protection under international law during times of war). One of the challenges associated with selecting a term to designate such individuals is that the Law of Armed Conflict (LOAC) definition of 'combatant' is limited to the context of international armed conflicts. See Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, June 8, 1977, 1125 UNTS 3 [hereinafter Protocol I] ("Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."). As a result, various terms have been offered for this designation, including unlawful combatant, unprivileged belligerent, fighter, non-state actor, and non-state opponent. All of these terms reflect a common underlying meaning: designation of an individual who, as the result of his relationship with enemy belligerent leadership and function as an enemy belligerent operative, should be treated for purposes of attack authority no differently than a combatant within the meaning of Protocol I.

belligerents or civilians taking a direct part in hostilities fall into this category, the nature of the non-state operatives has blurred the line between civilians protected from deliberate attack and belligerent operatives subject to attack.<sup>2</sup> Indeed, many scholars of military strategy contend that this blurring is the result of deliberate tactics employed by non-state operatives in an effort to offset the military superiority of their nation state military opponents by adding tremendous complexity to the target decision-making process.<sup>3</sup>

The target identification and selection process is never easy; uncertainty is an element of any armed conflict. Threat identification has always been a core task of U.S. armed forces, a task intended to not only ensure the lawful use of combat power, but to also maximize the tactical and operational effects of that use while mitigating the risk to civilians.<sup>4</sup> However, when engaged in

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<sup>2</sup> See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 188 (2010) ("A combatant remains a combatant when he/she is not actually fighting."); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 33 (2nd ed. 2010) ("Combatants fall into two categories: (i) Members of the armed forces of a belligerent Party . . . . (ii) Any non-members of the armed forces who take an active part in the hostilities . . . ."); see also Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 11-12 (2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (discussing the increasing prevalence of civilian participation in hostilities and the confusion it creates).

<sup>3</sup> See, e.g., Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 148 (2008) (highlighting the use of modern media by insurgents to exploit civilian casualties in order to use the U.S. force's adherence to law as a weapon against them); see also *Attack on the 507th Maintenance Company*, 23 March 2003, *An Nasiriyah, Iraq, Executive Summary*, RICIOK.COM, [http://www.riciok.com/attack\\_summary.htm](http://www.riciok.com/attack_summary.htm) (last visited Nov. 19, 2011) (outlining the attack on the 507th Maintenance Company by an enemy using asymmetric tactics). See generally MICHAEL L. GROSS, *MORAL DILEMMAS OF MODERN WAR: TORTURE, ASSASSINATION, AND BLACKMAIL IN AN AGE OF ASYMMETRIC CONFLICT* (2010) (evaluating modern changes to combatant relationships and identifying the moral issues inherent in asymmetric warfare); Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 VA. J. INT'L L. 209 (2005) (reviewing the history of combatant status and arguing for a modification of the law of combatants to allow for some intermediate level of recognition in order to incentivize some type of self-identification).

<sup>4</sup> See JOINT CHIEFS OF STAFF, JOINT PUB 5-03.1: JOINT OPERATION PLANNING AND EXECUTION SYSTEM VOLUME I (PLANNING POLICIES AND PROCEDURES) ch. 2, para. 8 (1993), available at [http://edocs.nps.edu/dodpubs/topic/jointpubs/JP5/JP5-03.1\\_930804.pdf](http://edocs.nps.edu/dodpubs/topic/jointpubs/JP5/JP5-03.1_930804.pdf) (discussing the use of threat identification and assessment in the larger context of the joint planning process); see also DEP'T. OF THE ARMY, FMI 3-07.22, COUNTERINSURGENCY OPERATIONS, para. 2-50 (2004) (calling for the

combat operations against non-state belligerents whose physical characteristics are almost always indistinguishable from the civilian population, the task of threat identification becomes exponentially more complex. Furthermore, the consequence of error is exacerbated by the risk of alienating the civilian population, a consequence fundamentally inconsistent with the core tenet of counterinsurgency strategy—protection of that population.<sup>5</sup>

The difficulty in distinguishing the protected (civilians) from the unprotected (belligerents and civilians taking a direct part in hostilities) does not, however, warrant a fundamentally different targeting paradigm in counterinsurgency operations, a non-international armed conflict (NIAC), than in conventional international armed conflicts (IAC).<sup>6</sup> The integrity of the target legality framework depends on the recognition of opposing belligerent groups in any armed conflict. This recognition facilitates implementation of the principle of distinction by allowing belligerent forces to segregate those they encounter into two distinct groups: those presumed hostile and therefore subject to immediate attack, and all others (civilians) presumed non-hostile and therefore protected from immediate attack.<sup>7</sup> As will be discussed in this Article, neither of these presumptions is absolute; both may be rebutted based on the nature of the interaction with

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coordination of ARSOF operations in order to avoid potential unwanted casualties).

<sup>5</sup> See COUNTERINSURGENCY OPERATIONS, *supra* note 4, para. 2–10 (stating that protection of the civilian population is essential to a successful counterinsurgency operation).

<sup>6</sup> Compare Melzer, *supra* note 2, at 76

In practice, civilian direct participation in hostilities is likely to entail significant confusion and uncertainty in the implementation of the principle of distinction. In order to avoid the erroneous or arbitrary targeting of civilians entitled to protection against direct attack, it is therefore of particular importance that all feasible precautions be taken in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities. In case of doubt, the person in question must be presumed to be protected against direct attack.,

with Protocol I, *supra* note 1, art. 51(2), (3) (“The civilian population as such, as well as individual civilians, shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities.”).

<sup>7</sup> Protocol I, *supra* note 1, art. 48 (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants . . .”).

friendly forces. However, these presumptions add a modicum of clarity to an increasingly uncertain operational environment, clarity derived from the very nature of armed conflict and essential to protect both civilians and belligerents from the effects of overzealous or unjustifiably hesitant targeting authority.

This may all seem obvious, but in reality there is an increasing tendency to treat all non-state actors as merely a conglomeration of civilians who take a direct part in hostilities. This trend gained momentum following publication by the International Committee of the Red Cross (ICRC) of the Interpretative Guidance on the Meaning of Direct Participation in Hostilities (DPH Study)—although, ironically, the DPH Study rejects this position.<sup>8</sup> Indeed, the derivative effect of considering all such non-state actors as civilians is that no one is genuinely protected by the distinction obligation.

The trend appears to be the result of the combined effect of the lack of an explicit definition of a combatant that is applicable to NIAC, and the DPH Study's endorsement of the concept of "continuous combat function" (CCF) as a means of establishing direct participation in hostilities (which results in a loss of civilian protection from attack).<sup>9</sup> The effect of the CCF concept has made it more convenient to analyze the legality of attacking non-state actors through the DPH methodology than to assess whether such actors fall into a category of presumptively targetable belligerents subject to attack, no differently than their IAC counterparts.

This Article will challenge that approach to targeting categorization in NIAC as flawed. In so doing, it will argue that it is critical to acknowledge that NIAC—any NIAC—involves hostilities between opposing armed belligerent groups whose members are presumptive military objectives. To support this argument, the Article begins by discussing the law of armed conflict's (LOAC's) categorization of civilians and belligerents (combatants in IAC), and how a lack of an explicit treaty definition of combatant in the NIAC context is an obstacle to acknowledging analogous categorization in NIAC.

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<sup>8</sup> See generally Melzer, *supra* note 2 (analyzing the problems presented by the increasing number of participants in hostilities that do not adequately distinguish themselves from civilians, and the need for a finer level of distinction between civilian and combatant).

<sup>9</sup> See *id.* at 27–36 (discussing the distinction of civilians, armed forces, and organized armed groups under the LOAC, and the application of the CCF concept).

The Article then explores organizational membership and how subordination to command and control is the fundamental difference between belligerents and civilians in any armed conflict. It will explain the difference between status and conduct based targeting and why a focus on conduct to assess belligerent status is merely a permutation of traditional status recognition analysis.

The Article then contrasts that approach by examining why the use of conduct undermines the extension of the DPH rule to define enemy belligerent forces. These problems result in the DPH Study's problematic and arguably schizophrenic imposition of a minimum force requirement even when targeting those engaged in CCF. As the Article details, the utility of CCF is not in assessing which civilians are taking a direct part in hostilities, but in determining when an individual appearing to be a civilian is in fact a belligerent operative of an armed organized group.

The Article will then address why treating all non-state opposition personnel as civilians taking a direct part in hostilities—even when applying the CCH concept—provides these operatives with an unjustifiable windfall and conflates law and rules of engagement. The Article concludes with a proposal of how to reconcile the DPH Study with status based targeting presumptions: maintain the distinction integrity. Acknowledging that NIAC involves armed hostilities between competing belligerent groups is a critical first step, and the DPH Study makes an important contribution to this acknowledgment. However, this must be accompanied by an additional acknowledgment: *all* belligerent operatives—those involved in IAC and NIAC—are subject to status based targeting authority

## 2. BACKGROUND

### 2.1. *LOAC Categorization of Civilians and Combatants*

Combatant. For a layman, the meaning of this term probably seems obvious. However, in the LOAC lexicon, nothing could be further from the truth. While it might be tempting to invoke the ubiquitous 'you know it when you see it' U.S. Supreme Court definition of pornography for the term combatant, operational reality and legal definition appear severely attenuated where this term is concerned.<sup>10</sup> The mere fact that a definition for combatant

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<sup>10</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

remained purely customary until finally defined in The 1977 Protocol Additional I to the Geneva Conventions of 1949 (AP I) indicates the extent of legal uncertainty and complexity associated with this term.<sup>11</sup>

Ironically, it was not widespread discomfort with the uncertainty of the term combatant that motivated adoption of an express definition in AP I.<sup>12</sup> Instead, it was the need to define "civilian"—a definition central to the protection established for civilians at the core of AP I's targeting regime—that provided the motivation. Because AP I adopted a negative definition of civilian (all individuals who are *not* combatants), it was necessary to provide an explicit definition of combatant.<sup>13</sup> Although it took until 1977 for the development of a positive treaty definition of combatant, there existed, prior to this date, a general customary understanding of the term. This customary understanding was based on two intertwined concepts: privileged belligerent and prisoner of war.<sup>14</sup>

In 1899, The Hague Convention II and Annexed Regulations—the first comprehensive multi-lateral treaty regulating land warfare—defined individuals lawfully authorized to participate in hostilities.<sup>15</sup> According to Article 1 of the Regulations:

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I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

*Id.*

<sup>11</sup> See Protocol I, *supra* note 1, art. 43(2) (defining combatants as members of the armed forces of any party to a conflict).

<sup>12</sup> See *id.* art. 50 (declaring a civilian to be any person other than those defined in Article 43 of the Protocol and Article 4(A) of the Convention).

<sup>13</sup> COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 610-12 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON 1977 ADDITIONAL PROTOCOLS] (discussing, over several paragraphs, the defining characteristics of a "combatant").

<sup>14</sup> See SOLIS, *supra* note 2, at 41-42 (discussing the history of the combatant's privilege); see also Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 (defining the term "prisoner of war" and outlining categories into which prisoners of war fall, under this provision).

<sup>15</sup> See The Hague Convention (II) with Respect to the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 1, July 29, 1899, 31 Stat. 1803, 1 Bevans 247, available at <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument> [hereinafter Hague (II) Regulations for War on Land] (providing for the issuing of instructions to armed land forces).

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."<sup>16</sup>

It is clear from this provision that regular armed forces, or "armies," were considered *ipso facto* lawfully authorized to engage in hostilities. An identical version of this definition was included in the 1907 revision of the Regulations.<sup>17</sup> This provision reflected the general understanding of the time that individuals authorized by their State to participate in armed hostilities – most obviously members of the regular armed forces but also militia and volunteer personnel properly connected to the command and control structure of the regular armed forces – were lawful belligerents.<sup>18</sup> Because the treaty recognized the lawful authority of these state forces to participate in hostilities, all individuals falling within this Hague definition were considered lawful belligerents: belligerents because the duties of war required them to engage in hostilities; lawful because the treaty recognized their legal right to do so.

The four part test for determining when associated militias qualified as lawful belligerents subsequently influenced the

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<sup>16</sup> *Id.* § 1, ch. 1, art. 1 (outlining the rights and duties of armies, militia, and volunteer corps).

<sup>17</sup> The Hague Convention (IV) with Respect to the Law and Customs of War on Land, Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land art. 1, October 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague (IV) Regulations for War on Land] (adopting the same definition found in Hague (II) Regulations for War on Land, for "[t]he qualifications of Belligerents").

<sup>18</sup> See *id.* (explaining that belligerents included armies, militia, and volunteer corps who were, among other requirements, "commanded by a person responsible for his subordinates").

development of a treaty definition of prisoner of war (POW).<sup>19</sup> Although neither the 1899 nor 1907 Hague Regulations included an express POW definition, both these treaties implied that any individual satisfying the definition of belligerent who falls into enemy hands would be a POW.<sup>20</sup> The linkage between the lawful belligerent definition and POW status became express in 1929, when the first treaty devoted to the protection of POWs came into force. Article 1 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War included within the protection of the treaty all captured individuals who met the Hague Regulation definition of lawfully qualified belligerent.<sup>21</sup> When updated in 1949, the drafters incorporated the Hague lawful belligerent definition verbatim as the POW definition. According to Article 4 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW):

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for

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<sup>19</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 14, art. 4(A) (defining prisoners of war through the use of definitions almost identical to that used in Hague (II) Regulations for War on Land).

<sup>20</sup> See Hague (II) Regulations for War on Land, *supra* note 15, § 1, ch. 2 (detailing the prescribed treatment of prisoners of war, in the chapter directly following the definition of "belligerents"); Hague (IV) Regulations for War on Land, *supra* note 17, § 1, ch. 2 (same).

<sup>21</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, 27 July 1929, 47 Stat. 2021, 118 L.N.T.S. 343.



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subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.<sup>22</sup>

This undisputed interrelationship between the Hague definition of lawful belligerent and the GPW definition of POW led to reliance on Article 4 of the GPW as the controlling definition of lawful belligerent, or combatant. Nonetheless, it was clear that nothing in Article 4 of the GPW purported to define the term combatant.<sup>23</sup> Instead, Article 4 simply relied on the antecedent Hague definition of lawful belligerent as the core for its POW definition. However, in the absence of an express definition of combatant, it became common practice to equate the GPW definition of POW with that of combatant – a practice difficult to question considering the origins of the POW definition.<sup>24</sup> What remained uncertain, however, was whether the implied combatant definition of Article 4 of the GPW (and by implication, Article 1 of the Hague Regulations) was exclusive, or whether it only defined combatants legally authorized to engage in hostilities. In other words, what is the proper characterization of a “fighter” without legal privilege? Can this fighter be considered a *de facto* combatant without privilege? Or by exclusion, is this individual a civilian engaging in conduct inconsistent with his presumptive inoffensive status?<sup>25</sup>

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<sup>22</sup> *Id.* art. 4.

<sup>23</sup> *See id.*

<sup>24</sup> *See* THE GENEVA CONVENTIONS (III) OF 12 AUGUST 1949: COMMENTARY 45–48 (Jean Pictet ed. 1952) (describing how the 1899 and 1907 Conferences’ lengthiest and most important discussions focused on the definition of “belligerent status”); *see generally* Geoffrey S. Corn, *Unarmed but How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT’L SEC. L. & POL’Y 257 (2008) (detailing the history of and qualifying characteristics that compose prisoner of war status, as outlined in part by the Geneva Conventions).

<sup>25</sup> *See* COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 558 (citation omitted).

The lack of an express combatant definition in the various treaties developed to regulate armed conflict, made it impossible to answer this question with certitude. Additional clarity emerged in 1977. In that year, AP I provided the first express treaty definition of combatant.<sup>26</sup> As indicated by the ICRC Commentary to the

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In armed conflict with an international character, a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of the armed conflicts of Article 1 (General principles and scope of application), paragraph 4, as the adversaries can have the same nationality. (52) Moreover, the concept of alien occupation often becomes rather fluid in guerrilla operations as no fixed legal border delineates the areas held by either Party, and this may result in insurmountable technical difficulties with regard to the application of some of the provisions of the Fourth Convention.

*Id.*

<sup>26</sup> Additional Protocols I and II of 1977 were developed to supplement and bring up to date the four Geneva Conventions of 1949. Although the United States played a significant role in the drafting of these treaties, Additional Protocol I was withdrawn from Senate consideration by President Reagan. See Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protections of Victims of Non International Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) (stating the U.S. government's reasoning as to why Protocol I would not be submitted for senatorial advice and consent). This was in large measure because of the conclusion that several provisions of Additional Protocol I extended LOAC protections to terrorists; and that the scope provision of Additional Protocol II was too restrictive. *Id.*

Nonetheless, prior to U.S. military response to the attacks of September 11, 2001, characterizing the bulk of Additional Protocol I as a reflection of customary international law binding on the United States would have been relatively uncontroversial among legal experts responsible for advising U.S. military planners and commanders. The post-September 11, 2001 legal determinations made by President Bush regarding the applicability of law of war provisions to the conflict with al Qaeda, however, radically altered this practice. A much more textual approach prevailed when interpreting law of war treaty obligations. See Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't. of Def., regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002), available at <http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (responding to the issue of whether certain treaties included in the laws of armed conflict apply to trial procedures and detention conditions for members of al Qaeda and the Taliban).

This revised approach to interpreting the status of provisions of Additional Protocol I is reflected by comparing treatment of this treaty in the law of war chapter of the *Operational Law Handbook*, which is perhaps the most widely-relied upon reference for military legal practitioners supporting ongoing operations. The current version of the *Handbook* provides the following:

treaty, the GPW left the definition of this critical term to inference: “[i]n the Third Convention, which deals only with the protection of prisoners of war, and not with the conduct of hostilities, this combatant status is not explicitly affirmed, but it is implicitly included in the recognition of prisoner-of-war status in the event of capture.”<sup>27</sup>

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1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Additional Protocol] I and II, 155 nations have ratified [Additional Protocol] I. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols . . . . This difference in obligation has not proved to be a hindrance to U.S./allied or coalition operations since promulgation of AP I in 1977.

INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, JA 422, OPERATIONAL LAW HANDBOOK 15 (2006).

Although this excerpt does not explicitly indicate a rejection of prior interpretations of obligation vis-à-vis Additional Protocol I, it clearly does not explicitly assert such an obligation. The full significance of this excerpt is only apparent when compared to the description of Additional Protocol I in prior editions of the *Operational Law Handbook*. For example, the 2003 edition states the following:

1977 Geneva Protocols (ref. (7)). Although the U.S. has not ratified [Geneva Protocol] I and II, judge advocates must be aware that approximately 150 nations have ratified the Protocols (thus most of the 185 member states of the [United Nations]). The Protocols will come into play in most international operations. U.S. Commanders must be aware that many allied forces are under a legal obligation to comply with the Protocols. Furthermore, the U.S. considers many of the provisions of the Protocols to be applicable as customary international law.

INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, JA 422, OPERATIONAL LAW HANDBOOK 11 (2003) (emphasis added). Comparison of these two versions of the *Operational Law Handbook* indicates a general “rollback” by the executive branch of the treatment of Additional Protocol I provisions. Numerous experts and government legal advisers have argued for years that many of these provisions reflect binding norms of customary international law. See, e.g., Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L & POL’Y 419 (1987) (demonstrating that the 1977 Protocols have a solid basis in customary international law); see also, e.g., Memorandum from W. Hays Parks, LCDR Michael F. Lohr, Dennis Yoder, and William Anderson, to John H. McNeill, Assistant Gen. Counsel (Int’l), Office of the Sec’y of Def., 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986). Unfortunately, opponents of this proposition have relied on the repudiation of Additional Protocol I by President Reagan. These opponents assert this repudiation is particularly relevant vis-à-vis the armed conflict with al Qaeda because it was motivated in large part by the United States’ concern that Additional Protocol I unjustifiably extended law of war protections to terrorist operatives.

<sup>27</sup> COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 515.

In order to provide a more certain definition of combatant, Article 43(2) of AP I provides that "[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."<sup>28</sup> Simple and direct, this definition reveals its roots in both the Hague Regulations and the GPW. Combatants include all members of the armed forces with the exception of medical personnel and chaplains—individuals technically considered non-combatant members of the armed forces because of their limited function of caring for and ministering to the wounded and sick. As combatants these individuals are legally authorized to participate in hostilities. Who falls into the category of armed forces? Article 43(1) answers this question by defining armed forces:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.<sup>29</sup>

Accordingly, armed forces include the organized armed units of a party to an armed conflict, and all such individuals are combatants vested with the legal authority to engage in armed hostilities. Perhaps of equal importance is that this definition was considered exclusive, meaning that *only* members of the armed forces (as defined by Article 43(1)) qualify as combatants within the meaning of international law. This conclusion is emphasized by the Commentary discussion of Article 43:

All members of the armed forces are combatants, *and only members of the armed forces are combatants*. This should therefore dispense with the concept of "quasi-combatants", which has sometimes been used on the basis of activities related more or less directly with the war effort. Similarly, any concept of a part-time status, a semi-civilian, semi-

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<sup>28</sup> Protocol I, *supra* note 1, art. 43(2).

<sup>29</sup> *Id.* art. 43(1).

military status, a soldier by night and peaceful citizen by day, also disappears. A civilian who is incorporated in an armed organization such as that mentioned in paragraph 1, becomes a member of the military and a combatant throughout the duration of the hostilities . . . .<sup>30</sup>

As noted above, the explicit definition of combatant and civilian as the exclusive legal categorization of individuals in armed conflict was directly linked to AP I's codification of the principle of distinction; requiring combatants to constantly distinguish between those individuals qualifying as lawful objects of deliberate attack, and civilians protected from being made the deliberate object of attack, necessitated this express definition.<sup>31</sup> The definition of combatant therefore established two competing targeting presumptions: combatants are presumed to be lawful objects of attack, whereas all other individuals (civilians by exclusion) are protected by a rebuttable presumption of inoffensiveness with an accordant immunity from deliberate attack.

A combatant—an individual who according to AP I is granted the legal privilege to participate in hostilities—must therefore be a member of the armed forces or a member of a paramilitary organization associated with the armed forces operating under traditional command and subject to the military unit's disciplinary structure.<sup>32</sup> It is clear that civilians (even when authorized by a state to be present in the conflict area and therefore entitled to POW status upon capture) are not combatants pursuant to AP I because they are not fully integrated into a military command, control, and disciplinary structure.<sup>33</sup> While Article 43 therefore added clarity to the categorization of individuals associated with armed conflict, two aspects of the definition call into question the extent of its impact on the broader question of targeting status

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<sup>30</sup> COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 515 (emphasis added).

<sup>31</sup> See *id.* at 514, 599–600 (providing distinct definitions for civilian and combatant, but noting that such sharp classifications cannot be performed easily).

<sup>32</sup> See Protocol I, *supra* note 1, art. 43(2) (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”).

<sup>33</sup> E.g., COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 515 (“All members of the armed forces are combatants, and *only* members of the armed forces are combatants.”) (emphasis added).

outside the context of inter-state hostilities. First and most obviously, because the definition is embedded in AP I, it is limited to situations of international (inter-state<sup>34</sup>) armed conflicts. Additional Protocol II (AP II), AP I's sister treaty supplementing the law applicable to NIAC, included no analogous definition.<sup>35</sup> Second, the definition of combatant included only individuals fighting on behalf of a state authority. Article 43 simply did not address individuals fighting on behalf of non-state entities.<sup>36</sup>

The inapplicability of Article 43's combatant definition to NIAC has contributed to what the authors assert is a false conclusion that "combatant" is an alien concept outside the context of IAC. Instead of focusing on the lack of an analogous definition in AP II, the more appropriate focus in assessing targeting status in NIAC is the relationship between the principle of distinction and

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<sup>34</sup> "Additional Protocol I contains significant advances in LOAC. The core LOAC concepts of distinction, unnecessary suffering, and proportionality, formerly found only in customary law, are codified and described in Additional Protocol I, if only in broad terms." SOLIS, *supra* note 2, at 122. However, some of the provisions of AP I pushed the boundaries of LOAC too far and rendered it objectionable to the United States (as well as many other nations) leading the United States not to ratify it. For example, Article 1(3) makes the treaty applicable to international armed conflicts. Protocol I, *supra* note 1, art 1(3). Then, Article 1(4) "goes onto expand the definition of what constitutes an international armed conflict" making the treaty applicable to CARs – conflicts purporting to resist colonial domination, alien occupation or a racist regime. SOLIS, *supra* note 2, at 123. The United States was unable to accept this definition arguing that it "blurs national and international conflicts, making the applicability of [LOAC], turn on the asserted motive of a rebel force." *Id.* at 124. The United States has not ratified AP I; the AP I version on an international armed conflict is not accepted as customary international law. See Protocol I, *supra* note 1, art 1(3)-(4) (noting that the protections of international customary law are available to persons whose cases are not covered by the Protocol).

<sup>35</sup> See generally Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 7, 1978, 1125 U.N.T.S. 610 [hereinafter Protocol II] (containing no definition of the term "combatant").

<sup>36</sup> See Protocol I, *supra* note 1, art. 43(1).

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

*Id.*

the division between civilians and *de facto* combatants.<sup>37</sup> As noted above, Article 43 was included in AP I as the essential predicate to implementing this principle. Accordingly, the underlying premise of Article 43 is that in order to facilitate the distinction process, it is essential to establish a clear dichotomy between combatant (privileged or unprivileged) and civilian. Without this dichotomy, the efficacy of this critical principle will inevitably be diluted. In essence, if everyone is a civilian, then no one is genuinely protected by the distinction obligation, for government forces will inevitably blur the line between “enemy” and “civilian.”

The fact that Article 43’s definition of combatant is tethered to the Hague definition of “qualified belligerent” likely explains why a similar article was not included in AP II. By linking the definition of combatant with legal qualification to participate in hostilities, the definition became incompatible with the law of NIAC, where by definition only the government forces may lawfully use force. From the inception of Common Article 3, the first LOAC provision developed specifically to regulate NIAC, states adamantly opposed even the suggestion that non-state belligerents were vested with legal privilege to engage in hostilities against state forces.<sup>38</sup> Although the ICRC pressed for such a

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<sup>37</sup> Although AP II does not contain an analogous definition of combatant as that in AP I, it does require that civilians be “[protected] against the dangers arising from military operations.” See Protocol II, *supra* note 35, art. 13.

<sup>38</sup> See 1 COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 43–44 (Jean Pictet ed., 1952) [hereinafter WOUNDED AND SICK COMMENTARY]:

From the very outset, in the course of the first discussions of a general character, divergences of view became apparent. A considerable number of delegations were opposed, if not to any and every provision in regard to civil war, at any rate to the unqualified application of the Convention to such conflicts. The principal criticisms of the Stockholm draft may be summed up as follows. It was said that it would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage. Attempts to protect individuals might well prove to be at the expense of the equally legitimate protection of the State. To compel the Government of a State in the throes of internal convulsions to apply to these internal disturbances the whole body of provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition. There was also a risk of common or ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Conventions, representing their crimes as ‘acts of war’ in order to escape punishment for them. A party of rebels, however small, would be entitled under the

development, because it would prohibit states from punishing their own citizens for taking up arms against lawful authority, the proposal was dead on arrival.<sup>39</sup> State opposition to granting dissident and insurgent belligerent forces legal privilege to engage in hostilities has been a constant feature of the LOAC even during an era of amalgamation of IAC and NIAC. Indeed, the inapplicability of legal privilege for non-state operatives in NIAC is today the most significant genuine difference between the law of IAC and NIAC.<sup>40</sup> Accordingly, applying Article 43's definition of combatant to NIAC was and remains incompatible with this fundamental difference in the nature of these two categories of armed conflict.

Nonetheless, what is most significant about AP I's definition of combatant is the segregation of individuals into two distinct categories for purposes of facilitating implementation of the principle of distinction. This segregation effectively sets the conditions for belligerents (members of opposing armed organized groups) to distinguish between lawful objects of attack and individuals protected from attack.<sup>41</sup> In the context of IAC, two considerations made it totally logical to link the definition of

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Conventions to ask for the assistance and intervention of a Protecting Power.

<sup>39</sup> See, e.g., *id.* (explaining how the differences in opinion led to criticism of the Stockholm draft).

<sup>40</sup> See Grand Jury Indictment at 11–12, *United States v. Walker Lindh* (E. Dist. Va. Feb. 5, 2002) (No. 02-37a) available at <http://news.findlaw.com/hdocs/docs/lindh/uswlindh020502cmp.html> (indicting a non-state actor for conspiracy to kill Americans based on his involvement with al-Qaeda); Memorandum from President George Bush to the Vice President et al. on the Humane Treatment of Taliban and al Qaeda (Feb. 7, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (expressing his view that the Geneva Convention does not apply to the United States' conflict with al-Qaeda because al-Qaeda is not a state actor); MINISTRY OF DEFENSE, JPS 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.6.2, at 389 (2004) (U.K.) ("Unlike combatants in an international armed conflict, members of dissident armed forces remain liable to prosecution for offences under domestic law."); Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 54 (2011) ("[I]ncreasingly prevalent in today's conflicts involving non-state actors and asymmetric warfare, are law of war provisions which govern detention of those who directly participate in hostilities, perform a continuous combat function for an organized armed group, or otherwise pose a security risk or threat.").

<sup>41</sup> See Protocol I, *supra* note 1, art. 43 (limiting the types of participants who have a "right to participate directly in hostilities").



combatant to the regular armed forces and militias properly integrated with those forces. First, armed forces had customarily been considered combatants. Second, IAC by its very nature almost always involves hostilities between two or more nation-state militaries.<sup>42</sup> Neither of these considerations extend to NIAC, especially the classic internal armed conflict.<sup>43</sup> Internal conflicts had customarily involved hostilities between government armed forces and dissident armed forces or other organized belligerent groups (or even between competing organized non-state belligerent groups). Designating all of these belligerents as combatants ran afoul of the assumption that state armed forces acted pursuant to lawful authority, whereas dissident forces acted without such authority.<sup>44</sup> Furthermore, NIAC by its nature did not involve hostilities between the regular armed forces of two states, but between regular state armed forces and non-state belligerent groups.<sup>45</sup>

Nonetheless, the recognition of opposition belligerent groups is an essential aspect of all conflict regulation. Nothing about the nature of NIAC undermines the importance of this recognition in relation to implementing the principle of distinction. Indeed, while there is no analogous combatant definition in AP II, that treaty

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<sup>42</sup> However, hostilities are not always necessary; the law applicable to IAC also applies to uncontested occupations. An occupation is simply "taking firm possession of enemy territory for the purpose of holding it." See DEP'T OF THE ARMY, FM27-10, *THE LAW OF LAND WARFARE*, ¶ 351-52(a) (1956), available at <http://www.aschq.army.mil/gc/files/fm27-10.pdf> (defining the term "occupation" and outlining the effectiveness, maintenance, and termination of an occupation). Occupations, whether contested or not, are governed by the Geneva Convention for the protection of civilians. E.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 3518 ("The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.").

<sup>43</sup> But see Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 309 (2007) (arguing that the either/or approach to determining whether a conflict is international or non-international fails to consider the possibility of a hybrid category of armed conflict: extraterritorial non-international armed conflict).

<sup>44</sup> See WOUNDED AND SICK COMMENTARY, *supra* note 38, at 43-44 ("Insurgents . . . are not all brigands.").

<sup>45</sup> E.g., *id.* (stating that the reason states did not want to extend the scope of Common Article 2 was so as not to extend legitimacy to internal dissident groups).

does impose an explicit distinction obligation to "parties" to a NIAC. According to Article 13:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.<sup>46</sup>

This prohibition against making civilians the object of attack in the context of NIAC necessarily implies that there must be other individuals falling outside this protection who are subject to a presumption of targetability. How are such individuals characterized? If they fall within a presumptive lawful attack authority, they cannot properly be considered civilians, because civilians benefit from the inverse presumption protecting them from deliberate attack. Are they combatants? The absence of a combatant definition in AP II might suggest a negative answer to this question. Certainly, it is difficult to sustain an argument that they are combatants within the meaning of the AP I combatant definition—an individual legally privileged to participate in hostilities. However, the obvious division between lawful and unlawful objects of attack reflected in Article 13 indicates that organized non-state belligerent operatives are, in effect, combatants without privilege, individuals subject to presumptive lawful attack authority by virtue of their status, yet lacking any international legal authority to participate in hostilities against the state.<sup>47</sup>

The Commentary to Article 13 corroborates the conclusion that Article 13 does indeed reflect the assumption that civilians are distinct from the organized armed groups engaged in NIAC.<sup>48</sup>

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<sup>46</sup> Protocol II, *supra* note 35, art. 13(1)–(2).

<sup>47</sup> See *id.* art. 13(3) ("Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.").

<sup>48</sup> See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 1447–53 (analyzing the implicit meaning of Article 13 and providing definitions of civilians, how military groups should interact with known civilian populations, and defining the term "attack" for its use in the Article's prohibition against attacking civilians).

These groups are normally not characterized as combatants (for the reasons explained above), but instead as “parties to the conflict.” For example, in emphasizing the obligation that belligerent parties in NIAC take measures to ensure compliance with Article 13, the Commentary notes:

Each *party* should, in good faith, design such measures and adapt them to the specific circumstances, bearing in mind the means available to it, and based on the general principles relating to the protection of the civilian population *which apply irrespective of whether the conflict is an international or an internal one*.<sup>49</sup>

The Commentary also acknowledges that distinguishing between true civilians and members of armed non-state groups may often be difficult in the NIAC context, but that this does not alter the fundamental protection of the civilian. Interestingly, the term combatant slips into the Commentary discussion:

It cannot be denied that in situations of non-international armed conflict in particular, the civilian population sometimes shelters certain *combatants*, and it may be difficult to ascertain the status of individuals making up the population. However, we must point out that if the mere presence of some individuals not protected under paragraph 3 of this article were to permit an attack against a whole group of civilians, the protection enjoyed by the civilian population would become totally illusory.<sup>50</sup>

These references to the commentary all point to the same conclusion: although the treaty law of NIAC does not include an express combatant definition, NIAC involves hostilities between state armed forces and non-state de facto combatants.

The alternative inference derived from the absence of a definition of combatant in treaties regulating NIAC is that the concept is exclusive to IAC. Accordingly, NIAC involves hostilities between state armed forces and civilians directly participating in hostilities. This interpretation is fatally flawed. As will be explained in greater detail below, it distorts the fundamental lines of authority and obligation historically associated with armed conflict. By treating members of armed

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<sup>49</sup> *Id.* at 1449 (emphasis added).

<sup>50</sup> *Id.* at 1452 (emphasis added).

belligerent groups as civilians directly participating in hostilities – even when applying an expansive definition of direct participation endorsed by the DPH Study – the authority of government forces to engage and subdue these individuals is diluted. Furthermore, refusal to segregate the population into *de facto* combatant and civilian populations compromises the principle of distinction.

These inevitable consequences of failing to acknowledge non-state belligerents in the context of NIAC motivated the ICRC to conclude that the legal authority to attack members of non-state belligerent groups in NIAC is identical to the authority to engage combatants in IAC.<sup>51</sup> While not using the term combatant to characterize members of such groups, it is clear that the ICRC understands that the authority to target non-state belligerent operatives is not based exclusively on a DPH test. Instead, the DPH rule operates as a limitation on the protection afforded to civilians in NIAC no differently than it does in IAC. However, this rule is inapposite to members of armed belligerent groups, for such individuals are not properly considered true civilians, but instead 'belligerents' subject to lawful attack by virtue of their connection and role within the group. Accordingly, unlike civilians who take a direct part in hostilities, the legality of attacking such individuals is derived from their membership status and not their individual conduct assessed on a case-by-case basis. This conclusion is reflected in the DPH Study. According to Part II:

While it is generally recognized that members of State armed forces in non-international armed conflict do not qualify as civilians, treaty law, State practice, and international jurisprudence have not unequivocally settled whether the same applies to members of organized armed groups (i.e. the armed forces of non-State parties to an armed conflict). Because organized armed groups generally cannot qualify as regular armed forces under national law, it might be tempting to conclude that membership in such groups is simply a continuous form of civilian direct participation in hostilities. Accordingly, members of organized armed groups would be regarded as civilians who, owing to their continuous direct

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<sup>51</sup> See Melzer, *supra* note 2, at 36 (concluding that civilians cease to be identified as such when they engage in continuous combat as members of organized armed groups).

participation in hostilities, lose protection against direct attack for the entire duration of their membership. *However, this approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.* As the wording and logic of Article 3 GC I-IV and Additional Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.<sup>52</sup>

If the ICRC is correct (consistent with the thesis of this Article), what then distinguishes civilians from non-state belligerent operatives<sup>53</sup> in the context of NIAC? As noted above, the answer cannot be found in any positive treaty provision applicable to NIAC. Instead, the answer is revealed by considering the fundamental difference between belligerents and civilians in any armed conflict: subordination to belligerent command and control.

## *2.2. Role of Organizational Membership and Subordination to Command and Control*

Armed conflict involves the contest between belligerent opponents organized into military units acting to achieve tactical, operational, and strategic objectives. The very purpose of the organized nature of belligerent groups is to ensure that individuals act to achieve these collective military goals. The inherent obligation of members of such groups to obey the orders of military and civilian superiors is consistent with this purpose. Command structure, rank, and the duty of obedience all reflect a simple axiom of belligerent groups: members of these groups act

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<sup>52</sup> *Id.* at 27–28 (emphasis added) (footnotes omitted).

<sup>53</sup> The Authors use the term “belligerent” in lieu of “combatant” for the purpose of distinguishing non-state belligerent operatives (who lack any legal privilege to participate in hostilities) with state belligerent operatives who are designated “combatants” in accordance with Article 43 of AP I. However, this is not intended to suggest any fundamental difference in the authority to subject individuals of either designation to deliberate attack.

as agents of the group leadership to achieve military goals, not as individuals.<sup>54</sup>

From the inception of treaty-based recognition of belligerents in the 1899 Hague Regulations, emphasis on this subordination to command authority has defined the concept of belligerent.<sup>55</sup> As noted above, this was originally reflected in the requirement that individuals operate on behalf of the state—the only entity authorized within the Westphalian system to authorize lawful belligerent conduct.<sup>56</sup> However, it is also clear that this was not in and of itself sufficient to qualify as a belligerent. In addition, belligerents were those individuals integrated into the command and control structure of a military unit for the purpose of engaging in armed hostilities. These latter elements of belligerent status are reflected in the requirement that the individual carry arms openly and conduct operations in accordance with the laws of war—both of which imply exercising a belligerent function.<sup>57</sup> Accordingly,

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<sup>54</sup> See, e.g., CTR. FOR ARMY LEADERSHIP, DEP'T OF THE ARMY, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE (2006), available at <http://usacac.army.mil/cac2/Repository/Materials/fm6-22.pdf> (noting that the U.S. Army's oath requires that "[s]oldiers simultaneously acknowledge the authority of the President as Commander in Chief and officers as his agents" and that "[t]he purpose of the oath is to affirm military subordination to civilian authority"); see also *Yamashita v. Styer*, 66 S. Ct. 340, 353–58 (1946) (J. Murphy dissenting) (arguing that the majority's reasoning for charging the Japanese General with war atrocities committed by troops under his command but which he did not order was without precedent in international law and a violation of due process); Corn, *supra* note 24, at 259–61 (proposing the functional discretion test as "an alternate approach for determining the legal limits of using civilian personnel" in battlefield support functions).

<sup>55</sup> See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 45–48 (overviewing early dialogue concerning defining a "belligerent" and noting that 1907 Hague regulations ultimately employed "*that of being commanded by a person responsible for his subordinates*" as one of the required elements for obtaining belligerent status).

<sup>56</sup> The Westphalian system refers to the balance-of-power system that arose out of the 1648 Peace of Westphalia in which the power of a state was determined by the number of other states with "substantially equal strength." HENRY KISSINGER, DIPLOMACY 21 (1994). See also WOUNDED AND SICK COMMENTARY, *supra* note 38, at 43–44 (noting states' objections to providing legal recognition to rebel groups and objecting to allowing such groups protection under Article 3 when engaging in acts of aggression); GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW tbl. 1 (2008) (characterizing states' sovereignty within the Westphalian system as containing "[i]ndependence and supreme authority . . . within their territory").

<sup>57</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 135 (describing prisoners of war as, inter alia, either members of the armed forces, members of the militia, or persons who accompany

subordination to the authority of belligerent group leadership for the purpose of engaging in hostilities at the direction of that leadership is the true sine qua non of belligerent status. As the DPH Study notes:

Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State's armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as State armed forces.<sup>58</sup>

This language indicates another acknowledgment that NIAC involves hostilities between armed belligerent groups—in the terminology of Common Article 3, “Parties” to an armed conflict.<sup>59</sup> If this is true (as the author believes it is), then it seems logical that the key factor in determining belligerent status—particularly for non-state operatives—cannot be the state subordination element. Instead, the key factor is membership in the belligerent organization exercising a function historically associated with belligerent operatives, namely participating in hostilities. This is precisely the equation proposed by the DPH Study to distinguish between a genuine civilian and a member of a non-state belligerent group:

Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”).<sup>60</sup>

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members of the armed forces or the militia, and thus suggesting that a prisoner of war is someone who likely exercised a belligerent function).

<sup>58</sup> Melzer, *supra* note 2, at 31–32.

<sup>59</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, at 27 (“*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.*”).

<sup>60</sup> See Melzer, *supra* note 2, at 33.

With the exception of dissident armed forces (whose "status" as belligerents is revealed by their membership in an armed force formerly loyal to government authority), determining NIAC belligerent status is unquestionably complex. Lacking the prospect of combatant immunity, there is little incentive for non-state operatives to wear uniforms or other insignia that distinguish them from the civilian population.<sup>61</sup> As a result, it is often difficult to determine the difference between civilians and non-state belligerent operatives based on outward appearance. Instead, the difference will almost inevitably turn on the nature of the individuals' conduct. When that conduct indicates the individual is acting as an agent of the belligerent group leadership for the purpose of engaging in hostile functions, it in effect establishes belligerent status.

Herein is the ultimate complexity of acknowledging belligerent status in NIAC: while it is this status that subjects the operative to the scope of targeting authority identical to that applicable to a combatant in IAC, determining that status inevitably requires assessment of individual conduct.<sup>62</sup> Focusing on relevant indicators to determine belligerent status is nothing new. This has always been an aspect of the execution of military operations during armed conflict, what military operators would call threat recognition.<sup>63</sup> What complicates this process in the NIAC context

<sup>61</sup> See Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 262–63 (2011) (noting that the United States deemed Taliban fighters unlawful enemy combatants not because "they were not fighting on behalf of a state," but rather because "they failed to meet the 'right of person' component . . . [by failing] to wear a distinctive uniform").

<sup>62</sup> Compare Protocol I, *supra* note 1, art. 43

The armed forces of a Party to a conflict consist of all organized armed forces, groups, and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party.,

with Protocol II, *supra* note 35, art. 13(3) (providing no definition of combatant, but mandating that civilians be protected from attack unless they take a direct part in hostilities, thereby requiring a conduct-biased analysis in the context of a NIAC).

<sup>63</sup> See *Appendix B, A Soldier's Task: Use Force Appropriately*, GLOBALSECURITY.ORG, [http://www.globalsecurity.org/military/library/report/call/call\\_96-6\\_roeappb1.htm](http://www.globalsecurity.org/military/library/report/call/call_96-6_roeappb1.htm) (last visited Nov. 18, 2011) (describing the procedures Army personnel should follow in



is the reality that the indicators of threat recognition (belligerent status) are rarely as concrete and overt as in the traditional IAC context. The evolving nature of NIAC, which today includes armed hostilities between states and transnational non-state groups, further exacerbates this complexity.<sup>64</sup> It is critical, however, to distinguish between targeting authority triggered by status and targeting authority triggered by conduct, even when conduct is the key “threat recognition” factor resulting in status. Thus, while conduct is the key analytical indicator of status, this does not equate to conduct-based targeting authority – the type of authority utilized to respond to a genuine DPH situation.<sup>65</sup>

This conduct based status determination is the true significance of the CCF concept endorsed in the DPH Study when applied in the NIAC context.<sup>66</sup> In essence, in NIAC, CCF is a methodology to assess belligerent status and thereby trigger status-based targeting authority.<sup>67</sup> As a method of assessing status, CCF is therefore merely a threat recognition equation that leads to a status

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anticipating or responding to threats and determining the amount of force needed under the circumstances).

<sup>64</sup> See, e.g., *Obama Declares America ‘At War’ with Al Qaeda, Offers New Security Initiatives*, CNSNEWS (Jan. 7, 2010), <http://www.cnsnews.com/node/59446> (reporting that President Obama declared that America is “at war against al Qaeda”).

<sup>65</sup> A genuine DPH situation refers to a situation in which a civilian is engaged in “acts, which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus . . . becom[ing] a legitimate target, [but] only for as long as he takes part in hostilities.” COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 618.

<sup>66</sup> The report remarks:

Consequently, under IHL, the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities (hereafter: “continuous combat function”). Continuous combat function does not imply *de jure* entitlement to combatant privilege. Rather, it distinguishes members of the organized fighting forces of a non-state party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.

Melzer, *supra* note 2, at 33–34 (footnotes omitted).

<sup>67</sup> See *id.* at 36 (providing the standard used for determining the targetability of belligerents in a NIAC: “In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

determination triggering accordant targeting authority. It is not a method for determining when a civilian's conduct justifies a hostile response because of DPH (conduct based targeting authority).<sup>68</sup> CCF is therefore merely the threat recognition criterion that is used to confirm belligerent status, a conclusion reflected in the DPH Study:

Continuous combat function requires lasting integration into an organized armed group *acting as the armed forces of a non-State party to an armed conflict*. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act. This case must be distinguished from persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life. Such "reservists" are civilians until and for such time as they are called back to active duty.<sup>69</sup>

This test provides a logical and workable method to trigger status based targeting authority in NIAC. While it is obviously less clear-cut than reliance on uniforms to distinguish combatants from civilians, it accounts for two realities. First, as the DPH Study emphasizes, members of organized belligerent groups in NIAC (individuals who are presumed hostile to friendly forces and therefore subject to a presumption of targetability) are a distinct category from civilians.<sup>70</sup> Second, the lack of any real incentive for members of these groups to wear distinctive uniforms or insignia necessitates reliance on their patterns of conduct as the principal

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<sup>68</sup> See *id.* at 45 (explaining that DPH "refers to specific hostile acts carried out by individuals" but not mentioning CCF).

<sup>69</sup> *Id.* at 34 (emphasis added) (footnote omitted).

<sup>70</sup> See *id.* ("Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces.").

threat recognition criterion used to assess when they are part of an “enemy” party to the conflict.<sup>71</sup>

The CCF test has, however, contributed to the flawed inference that non-state operatives cannot be characterized as belligerents, but must instead be treated as civilians.<sup>72</sup> The CCF focus on individual conduct is interpreted by some as simply indicating a special class of civilians taking a direct part in hostilities. This leads to the erroneous conclusion that CCF derived targeting authority is analogous to what military operators know as

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<sup>71</sup> See *id.* at 35.

In practice, the principle of distinction must be applied based on information which is practically available and can reasonably be regarded as reliable in the prevailing circumstances. A continuous combat function may be openly expressed through the carrying of uniforms, distinctive signs, or certain weapons. Yet it may also be identified on the basis of conclusive behavior, for example where a person has repeatedly directly participated in hostilities in support of an organized armed group in circumstances indicating that such conduct constitutes a continuous function rather than a spontaneous, sporadic, or temporary role assumed for the duration of a particular operation.

*Id.*

<sup>72</sup> See generally Bill Boothby, “And for Such Time As”: The Time Dimension to Direct Participation in Hostilities, 42 N.Y.U. J. INT’L L. & POL. 741 (2010) (finding civilians lose protection under the Guidance when engaging in acts of preparation for direct participation); Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637 (2010) (critiquing the four critical perspectives on the interpretation of DPH); Nils Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 831 (2010) (arguing that the ICRC’s position on the definition of membership in an organized armed force can be accurately understood when Guidance sections are conjunctively read); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769 (2010) (providing a critical historical analysis of the Guidance regarding the protection of civilians during war); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697 (2010) (explaining that civilians who “directly participate” in hostilities are not protected from attack); Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L SEC. J. 5 (2010) (noting that the Guidance formula for international armed conflict defines civilians negatively); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010) (arguing that “organized armed groups” are classified with unique criteria and are not considered civilian).

conduct-based rules of engagement.<sup>73</sup> While this error will be addressed in more detail below, in summary it conflates the focus on conduct to assess membership (thereby triggering status based targeting authority) with the focus on individual conduct to determine when a civilian loses presumptive protection from attack.

It is true that the ultimate outcome of both of these equations is a justified use of force. However, the impact of competing presumptions associated with status versus conduct based targeting authority indicates there are important, albeit subtle, second and third order consequences resulting from this erroneous interpretation. The conclusion that use of force is permitted against both a civilian directly participating in hostilities and a member of an armed belligerent group therefore does not justify interpreting CCF in NIAC as a test to determine when a civilian is directly participating in hostilities as opposed to when the civilian becomes a member of a belligerent group. It is the thesis of this Article that CCF in NIAC establishes belligerent group status and not simply a temporary loss of civilian protection from attack. This is because integration into the belligerent forces of a non-state group is functionally synonymous with integration into a combatant force in IAC. Indeed, the DPH Study seems to emphasize this consequence of CCF in NIAC:

[I]t distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions.<sup>74</sup>

It is obviously significant that the term “distinguishes” is used in this passage, for it confirms that individuals who engage in a CCF in NIAC must be distinguished from civilians, even those civilians who take a direct part in hostilities.

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<sup>73</sup> Geoffrey S. Corn & Eric Talbot Jenson, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMPLE L. REV. 787, 815–18 (2008) (noting instances where the United States has employed conduct-based rules of engagement as justifications for carrying out targeted attacks).

<sup>74</sup> See Melzer, *supra* note 2, at 33–34.

3. WHY THE USE OF CONDUCT TO ESTABLISH STATUS  
UNDERMINES THE EXTENSION OF THE DPH RULE  
TO DEFINE ENEMY BELLIGERENT FORCES

It is clear that both organizational status and DPH—whether assessed on a case-by-case basis or pursuant to the CCF test—result in lawful targetability.<sup>75</sup> This raises an obvious question related to targeting individuals hostile to a friendly force: Why does it matter whether forces apply status or conduct-based targeting authority? This question has certainly become more difficult to answer in the wake of the CCF test, which mitigates the consequence between status and conduct based targeting authority. However, treating CCF as a form of civilian conduct triggering targeting authority dilutes the authority to address threats to friend forces emanating from organized belligerent groups. Such dilution should be unacceptable—to both belligerents and, perhaps surprisingly, civilians.

All battlefield targeting authority falls into two broad categories: status and conduct based. Status based targeting authority is, as described above, triggered by the determination that a proposed object of attack is a member of an opposition belligerent force.<sup>76</sup> In contrast, conduct based targeting is based on the determination that an individual presumed inoffensive is engaged in conduct hostile to the friendly force.<sup>77</sup> Accordingly, status based targeting has always typified the traditional conception of armed hostilities between armed forces, whereas

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<sup>75</sup> See Protocol II, *supra* note 35, art. 13(3) (allowing for the targeting of civilians “for such time as they take a direct part in hostilities”); see also Melzer, *supra* note 2, at 36 (suggesting allowance of targeting of such individuals who serve a “continuous combat function”).

<sup>76</sup> See Protocol I, *supra* note 1, art. 43(1)–(2):

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.
2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

conduct based targeting reflects more of a constabulary function performed by the armed forces in the context of armed hostilities.

This dichotomy is reflected in the traditional DPH equation. Prior to the advent of the CCF test, DPH was an extremely restrictive concept. Only when a civilian engaged in conduct that would result in actual and immediate harm to an armed force did he lose legal protection from being made the deliberate object of attack.<sup>78</sup> This test was and remains premised on a critical presumption: civilians are inoffensive and deviation from that condition is an exceptional situation.<sup>79</sup> Accordingly, because the evidence supporting attack must be sufficient to prove a gross deviation from the presumed standard of behavior, the burden of risk is placed squarely on the responding armed force.<sup>80</sup>

The allocation of risk resulting from status-based targeting decisions is fundamentally different. The determination of hostile status triggers the opposite presumption from that afforded to civilians: that members of the opposition group represent an actual and ongoing threat of hostility to friendly forces. A status determination triggers the authority, derived from the principle of military necessity, to take "those measures not forbidden by international law which are indispensable for securing the complete submission of the *enemy* as soon as possible."<sup>81</sup> It is critical to recognize that this authority is not confined to the individual. Reference to "the enemy" indicates (in accordance with the customary nature of armed hostilities) that it is the

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<sup>77</sup> See Protocol II, *supra* note 35, art. 13(3) (allowing for the targeting of civilians "for such time as they take a direct part in hostilities").

<sup>78</sup> See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 618-19.

The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities.

*Id.*

<sup>79</sup> See *id.* at 618-19 (distinguishing between civilians directly participating in hostilities and those who are merely participating in the war effort).

<sup>80</sup> See, e.g., Prosecutor v. Boškoski, Case No. IT-04-82-A, Judgment on Appeal, paras. 79-86 (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010) (noting that the burden of proof is not shifted from the armed force making the attack just because there is insufficient evidence in regards to the appearance of the victim).

<sup>81</sup> See DEPT. OF THE ARMY, *supra* note 42, ¶ 3(a) (emphasis added).

opposition organization, and not just individual operatives of the organization, that is the legitimate objective of submission.<sup>82</sup> Accordingly, the law authorizes resort to deadly force immediately upon the belligerent status determination. Perhaps more importantly, because members of opposition belligerent groups qualify as lawful military objectives as a result of their status, the status determination triggers the legal authority to employ force against them as a measure of first resort, with no requirement to exhaust less than lethal means of subduing the threat. This reflects an axiom of targeting law: the burden of risk associated with armed hostilities is placed squarely on members of armed belligerent groups for as long as their status remains extant. They remain subject to attack unless and until they take affirmative action to rebut the presumption of threat, specifically by surrender or by being made combat ineffective as the result of wounds or some other disability.<sup>83</sup>

The CCF test certainly represents an important step forward in reconciling the concept of direct participation with the reality of contemporary armed conflicts. However, it confuses these competing but complementary presumptions because it straddles a line between status and conduct based targeting authority, blurring the resulting operative targeting presumptions.<sup>84</sup> While CCF indicates the individual is a member of an enemy belligerent group, the test is clearly conduct oriented, and the consequence of satisfying the test embedded within the DPH rule.<sup>85</sup> As a result, a

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<sup>82</sup> The qualifier “not forbidden by international law” indicates that the authority to inflict harm terminates once an opponent is rendered *hors de combat* (out of combat by reason of wounds, sickness, or capture). See *id.*; Protocol I, *supra* note 1, art. 41.

<sup>83</sup> See Protocol I, *supra* note 1, art. 41(2)(a)-(c) (describing the three types of persons *hors de combat* as being those who are captured by adverse party, show an intention to surrender, or have been incapacitated from wounds or illness).

<sup>84</sup> See Melzer, *supra* note 2, at 27-36 (commenting on the “mutual exclusiveness of the concepts of civilian, armed forces, and organized armed groups”).

<sup>85</sup> See *id.* at 36.

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of state armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities in non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose

CCF determination results in the loss of presumptive protection from attack, just as actually firing a weapon at a military force would result in the loss of protection for a civilian acting individually.<sup>86</sup> However, because it is associated with a rule resulting in the loss of *civilian* protection, it risks becoming the exclusive test for assessing the targetability of individuals not incorporated into an armed force subordinate to state authority and control—namely non-state belligerent groups in NIAC. This is highly problematic because it effectively renders all non-state actors civilians, who in turn, benefit from presumptive protection from attack.

It is notable that the ICRC recognized in the DPH Study that such an interpretation is unjustified, and that it diminishes the protection of the civilian population at large.<sup>87</sup> This recognition is absolutely appropriate. As the ICRC notes, the principle of distinction depends on the recognition of opposing belligerent groups, for such recognition facilitates targeting categorizations during armed conflict.<sup>88</sup> In effect, this is a concession that the legal authority for targeting such groups is based on a fundamentally different presumption than that applicable to civilians directly participating in hostilities—even those falling within the CCF test. Nonetheless, the DPH Study itself reflects an ongoing uncertainty as to the exact effect of the CCF concept, which contributes to the broader uncertainty as to the presence of non-state belligerent groups. The most profound example of this is Section IX of the Study.<sup>89</sup>

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continuous function it is to take a direct part in hostilities ("continuous combat function").

*Id.*

<sup>86</sup> Firing a weapon at a military force would be an act "which by [its] nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces" and therefore would result in loss of protection for the civilian. See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 618.

<sup>87</sup> See Melzer, *supra* note 2, 27–28 (remarking that unclear boundaries between civilians and non-State armed forces will result in potential harms for the civilian population).

<sup>88</sup> See *id.* at 28 ("[T]his approach would seriously undermine the conceptual integrity of the categories of persons underlying the principle of distinction, most notably because it would create parties to non-international armed conflicts whose entire armed forces remain part of the civilian population.").

<sup>89</sup> See *id.* at 77–82 (suggesting an imperative necessity to maintain restraint and proportionality even when dealing with an organized, albeit non-State, armed force).



#### 4. INTERPRETIVE GUIDANCE SCHIZOPHRENIA

##### 4.1. CCF and the Minimum Force Requirement

Perhaps the most significant practical distinction between status and conduct based targeting authority is the effect of the principle of proportionality.<sup>90</sup> Because a determination that an individual is a member of an enemy belligerent group triggers status based targeting, the LOAC has always permitted the attacking force to employ deadly force as a measure of first resort. In other words, status indicates the individual is a lawful military objective: a person, place, or thing subject to lawful attack.<sup>91</sup> This authority is in no way qualified by the rule of proportionality. Instead, the only limitation on the selection of methods and/or means of warfare to attack a military objective (beyond the initial targetability determination) is the prohibition against the calculated infliction of unnecessary suffering.<sup>92</sup>

It could be argued that the unnecessary suffering prohibition implicitly imposes a proportionality obligation. This is, however, incorrect. The foundation of the rule prohibiting unnecessary suffering is the bar against the employment of weapons (means) or tactics (methods) against a lawful object of attack *calculated* to cause superfluous injury or suffering.<sup>93</sup> What is superfluous? This has unquestionably been a vexing LOAC question. However, the nature of military doctrine, training, tactics, and operations all

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<sup>90</sup> Proportionality requires that armed forces refrain from any “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Protocol I, *supra* note 1, art. 57(2)(a)(iii).

<sup>91</sup> See *id.* art. 52(2).

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

*Id.*

<sup>92</sup> See *id.* art. 35(2) (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”).

<sup>93</sup> See *id.* art. 35(1) (giving Parties the right to “choose methods and means of warfare”) (emphasis added).

indicate that causing death, as a measure of first resort is not considered legally superfluous.<sup>94</sup>

In fact, deliberately inflicting injuries that cannot be treated—for example permanent loss of sight or hearing—is far more likely to be considered to run afoul of this rule than killing the same enemy belligerent.<sup>95</sup> This might seem oxymoronic, but it is a reflection of the customary understanding that employing methods and means of warfare with the objective of causing death as a measure of first resort is consistent with the fundamental authority derived from the principle of military necessity to take all measures necessary to bring about the prompt submission of an enemy organization.

This conclusion is reinforced by one of the most important rules in AP I: Article 51(5).<sup>96</sup> Commonly called the proportionality rule, Article 51(5) prohibits attacks on lawful military objectives when the commander anticipates that the attack will produce excessive collateral damage or incidental injury.<sup>97</sup> It is clear that the beneficiaries of this rule are not the objects of attack (military objectives), but instead victims of collateral effects, namely civilians.<sup>98</sup> The benefit afforded to the objects of attack is purely gratuitous—an otherwise lawful attack against military objectives is prohibited not because of the disproportionate effect it will have

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<sup>94</sup> See SOLIS, *supra* note 2, at 270.

"Warfare . . . justifies subjecting an enemy to massive and decisive force, and the suffering that it brings. Military necessity only justifies the infliction of suffering upon an enemy combatant . . . . [H]owever . . . military necessity only justifies the infliction of as much suffering as is necessary to bring about the submission of an enemy." Military necessity is the balance between destruction of the enemy and humanity.

*Id.* (quoting Geoffrey Corn, *International & Operational Law Note: Principal 4: Preventing Unnecessary Suffering*, THE ARMY LAWYER 1, 50-51 (1998)).

<sup>95</sup> See *Disarmament: The Convention on Certain Conventional Weapons*, UNOG, [http://www.unog.ch/80256ee600585943/\(httppages\)/4f0def093b4860b4c1257180004b1b30?opendocument](http://www.unog.ch/80256ee600585943/(httppages)/4f0def093b4860b4c1257180004b1b30?opendocument) (last visited Nov. 15, 2011) (outlining the prohibition on certain types of weapons which cause unnecessary suffering).

<sup>96</sup> Protocol I, *supra* note 1, art. 51(5).

<sup>97</sup> *Id.* art. 51(5)(b) ("An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive in relation* to the concrete and direct military advantage anticipated.") (emphasis added).

<sup>98</sup> Article 51 of API is entitled "Protection of the Civilian Population." *Id.* art. 51 (stating that civilians must be accorded protection against dangers arising from military operations).

on them, but because of the desire to protect civilians and or civilian property in their vicinity.<sup>99</sup>

No analogous proportionality protection is afforded to lawful objects of attack, including enemy belligerent forces.<sup>100</sup> Accordingly, it is legally impossible to employ excessive force against the deliberate and lawful object of violence in armed conflict; those objects may be attacked with whatever amount of force is considered necessary to bring about their immediate submission.<sup>101</sup> Perhaps more importantly, it is common practice to use overwhelming force against such enemy objectives in order to influence the subsequent behavior of enemy leadership and other enemy forces.<sup>102</sup> Of course, once the enemy belligerent is rendered *hors de combat* by wounds, sickness, or capture, he no longer qualifies as a lawful object of attack.<sup>103</sup> But the protection afforded to such an individual is in no way derived from a proportionality requirement; it is simply the result of the fact that the individual is no longer capable of engaging in belligerent conduct as an agent of the enemy belligerent leadership.<sup>104</sup>

If CCF is merely a threat recognition methodology resulting in a belligerent status determination, then individuals engaging in CCF should be subject to attack without any proportionality-based constraint. The DPH Study, however, suggests a contrary conclusion. In Section IX, the DPH Study indicates that the use of force directed against individuals falling within the CCF definition

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<sup>99</sup> *Id.* art. 51(1) (stating that Article 51 was written to increase the protection of civilians under LOAC).

<sup>100</sup> See generally Protocol I, *supra* note 1.

<sup>101</sup> See, e.g., *id.* arts. 48, 51, 57 (providing restrictions on otherwise lawful attacks for the protection of the civilian population but providing no protection or formula for restraint for purely military objectives).

<sup>102</sup> See, e.g., Sue Chan, *Iraq Faces Massive U.S. Missile Barrage*, CBS NEWS (Jan. 24, 2003), <http://www.cbsnews.com/stories/2003/01/24/eveningnews/main537928.shtml> (describing the war plan prior to the invasion of Iraq that would have called for an attack of 800 cruise missiles over two days against Baghdad in order to bring about the “psychological destruction of the enemy’s will to fight”).

<sup>103</sup> See Protocol I, *supra* note 1, art. 41 (“A person...*hors de combat* shall not be made the object of attack.”).

<sup>104</sup> COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 482 (“It is a fundamental principle of the law of war that those who do not participate in the hostilities shall not be attacked. In this respect harmless civilians and soldiers *hors de combat* are *a priori* on the same footing.”).

is subject to such a constraint.<sup>105</sup> However, even the purported source of this constraint reveals the invalidity of this proposition.

As noted above, *jus in bello* proportionality does not protect enemy belligerent operatives who qualify as objects of deliberate attack.<sup>106</sup> As a result, Section IX is unsupported by any positive or customary LOAC obligation. This is essentially conceded in the Study when it cites the general principle of humanity as the source of the constraint. According to Section IX:

In the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, first of all, based on the fundamental principles of military necessity and humanity .

...

While it is impossible to determine, *ex ante*, the precise amount of force to be used in each situation, considerations of humanity require that, within the parameters set by the specific provisions of IHL, no more death, injury, or destruction be caused than is actually necessary for the accomplishment of a legitimate military purpose in the prevailing circumstances . . . .

In sum, while operating forces can hardly be required to take additional risks for themselves or the civilian population in order to capture an armed adversary alive, it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force. In such situations, the principles of military necessity and of humanity play an important role in determining the kind and degree of permissible force against legitimate military targets.<sup>107</sup>

This application of the principle of humanity may seem appealing, but it is fundamentally inconsistent with the scope of authority established by the principle of military objective. This principle, as

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<sup>105</sup> Melzer, *supra* note 2, at 77 ("Loss of protection from direct attack, whether due to direct participation in hostilities (civilians) or continuous combat function (members of organized armed groups), does not mean that the persons concerned fall outside the law.").

<sup>106</sup> Protocol I, *supra* note 1, art. 51(5)(b) (providing protection for civilians and not other parties).

<sup>107</sup> Melzer, *supra* note 2, at 80–82.

explained above, allows for or restricts deliberate attack authority based on presumptions, presumptions that are inherently overbroad and under-inclusive.<sup>108</sup> Nonetheless, these presumptions provide for a certain degree of clarity and consistency in an otherwise chaotic environment.

It is clear that Section IX was motivated by the reality that application of the CCF concept would expand the scope of lawful targeting based on a determination of DPH. This likely produced discomfort: deliberate attack authority applicable to individuals who perform a CCF but who, at the moment when force is applied against them, may not be identifiable as belligerents based on conduct which creates an imminent risk to friendly forces. It also seems clear that the ICRC understood the minimal authority for applying a proportionality qualifier to belligerents. In justifying this purported limitation, the DPH Study begins by conceding that it will rarely apply to a lawful combatant in the IAC context:

In classic large-scale confrontations between well-equipped and organized armed forces or groups, the principles of military necessity and of humanity are unlikely to restrict the use of force against legitimate military targets beyond what is already required by specific provisions of IHL.<sup>109</sup>

The discussion then shifts the focus to the civilian engaged in DPH, revealing its palpable discomfort with subjecting such a civilian to targeting authority analogous in scope to that applicable to the traditional combatant:

The practical importance of their restraining function will increase with the ability of a party to the conflict to control the circumstances and area in which its military operations are conducted, and may become *decisive* where armed forces operate against selected individuals in situations comparable to peacetime policing. In practice, such considerations are likely to become particularly relevant where a party to the conflict exercises effective territorial control, most notably in occupied territories and non-international armed conflicts.

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<sup>108</sup> *Id.* at 80 (conceding that “it is impossible to determine . . . the precise amount of force to be used”).

<sup>109</sup> *Id.*

For example, an unarmed civilian sitting in a restaurant using a radio or mobile phone to transmit tactical targeting intelligence to an attacking air force would probably have to be regarded as directly participating in hostilities. Should the restaurant in question be situated within an area firmly controlled by the opposing party, however, it may be possible to neutralize the military threat posed by that civilian through capture or other non-lethal means without additional risk to the operating forces or the surrounding civilian population.<sup>110</sup>

As will be explained below, restricting this asserted targeting authority qualification to this type of civilian engaging in DPH (ostensibly in the IAC context) is arguably defensible. However, in a classic manifestation of the proverbial 'slippery slope', the DPH Study then extends the qualification to the NIAC non-state belligerent:

Similarly, under IHL, an insurgent military commander of an organized armed group would not regain civilian protection against direct attack simply because he temporarily discarded his weapons, uniform and distinctive signs in order to visit relatives inside government-controlled territory. Nevertheless, depending on the circumstances, the armed or police forces of the government may be able to capture that commander without resorting to lethal force.<sup>111</sup>

This one paragraph reveals the inherent schizophrenia of Section IX. It is simply incompatible with the DPH Study's implicit (if not explicit) recognition that CCF in the NIAC context results not in limited targetability, but instead on belligerent status. In essence, Section IX is an attempt to "re-civilianize" the NIAC non-state belligerent by cloaking that operative with a proportionality protection.<sup>112</sup> However, imposing a minimum necessary force obligation on government forces engaged in armed conflict against non-state belligerents is inconsistent with the concession that CCF

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<sup>110</sup> *Id.* at 80–81 (emphasis added).

<sup>111</sup> *Id.* at 81.

<sup>112</sup> *See id.* (noting that civilians must be taken into account in the proportionality assessment of a military operation that is likely to cause incidental harm to civilians).

produces belligerent status, and with the overall concept of status based targeting presumptions.

This proposed application of a unitary minimum necessary force qualifier to both civilians engaging in DPH in the IAC context (to include in an occupied area) and non-state belligerents is problematic on a broader level. By applying a force limitation rule ostensibly justified *vis-à-vis* civilians (even those taking a direct part in hostilities) to non-state belligerents, Section IX confuses the effect of CCF in the NIAC context. This confusion has, in the opinion of the authors, contributed to the more widespread misconception that non-state belligerents are merely civilians engaged in DPH who remain civilians while they are so engaged (albeit subject to use of force). However, the mixing of armed conflict and law enforcement response authority reflected in the above extract from Section IX exposes the danger of this premise.<sup>113</sup> In short, continuing to characterize these belligerent operatives as civilian leads to an inevitable but impermissible outcome: the dilution of state targeting authority and a corresponding lessening of the protection of the civilian population writ large.

This outcome is not only unjustified and inconsistent with status based targeting principles, it is arguably perverse, for it vests an unprivileged belligerent with greater protection than the privileged counterpart. As noted above, the DPH Study at least implicitly concedes CCF in NIAC results in belligerent status—a method of identifying members of organized armed groups (a party to an armed conflict).<sup>114</sup> However, applying the Section IX minimum force qualification to these belligerent operatives would grant them protection from being made the object of attack with the use of deadly force as a first resort.<sup>115</sup> No analogous protection applies to lawful combatants, who by virtue of that status are subject to such risk so long as they capable of acting as agents of enemy leadership.<sup>116</sup>

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<sup>113</sup> See *id.* at 80–82 (implying that proportionality might require that identifiable members of belligerent armed groups be non-lethally arrested, whether by the State's armed or police forces).

<sup>114</sup> See *id.* at 81 (proffering example of civilians directly participating in hostilities).

<sup>115</sup> See *id.* at 79 (forbidding causing injury or destruction when not necessary in order to accomplish a legitimate military objective).

<sup>116</sup> COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 482 ("It is a fundamental principle of the law of war that those who do not participate in the

Why the ICRC would propose such a minimum force qualification is understandable. By conceding CCF results in belligerent status for NIAC non-state operatives, the DPH Study conceded a broad scope of targeting authority for government forces. However, the CCF concept itself reflects the reality that threat identification in this context is far more complex than in traditional IAC—because clear objective criteria of belligerent status are rarely available.<sup>117</sup> Accordingly, the risk of error in the status decision is obviously increased *vis-à-vis* a non-state operative. Imposing a minimum force qualification on targeting authority would obviously mitigate that risk by requiring the attacking commander to forego the use of deadly force wherever and whenever feasible.

This anomaly was apparently not lost on the ICRC. Instead of accounting for it by drawing a bright line between belligerent targeting authority and the authority to use force in response to a civilian taking a direct part in hostilities, Section IX used it as an opportunity to open another front: extending the minimum necessary force obligation to all enemy belligerents.<sup>118</sup> The DPH Study cites Jean Pictet in support of this extension. However, in the same footnote, the DPH Study concedes that:

During the expert meetings, it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations (Report DPH 2006, pp. 75f., 78) and that armed forces operating in situations of armed conflict, even if equipped with sophisticated weaponry and means of observation, may not always have the means or

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hostilities shall not be attacked. In this respect harmless civilians and soldiers *hors de combat* are *a priori* on the same footing.”).

<sup>117</sup> In a traditional IAC combatants are required to distinguish themselves from the civilian population, but in a modern NIAC non-state forces have no desire or incentive to do so. See Protocol I, *supra* note 1, art. 44(3), (obliging combatants to distinguish themselves in combat in order to protect civilian populations); see also, Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL’Y REV. 253 (2011) (arguing for the extension of lawful combatant status as a means of ensuring compliance with humanitarian law).

<sup>118</sup> See Melzer, *supra* note 2, at 82 (“[I]t would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.”).



opportunity to capture rather than kill (Report DPH 2006, p. 63).<sup>119</sup>

Indeed, opposition to this interpretation as fatally flawed is reflected in subsequent scholarly critiques by members of the DPH working group, which notes that it is inconsistent with the widespread and customary understanding of status based targeting authority.<sup>120</sup>

Why would the ICRC muddy the proverbial waters with this overreaching? The most obvious reason, as noted above, is that it was considered necessary to offset the inherent expansion in risk to presumptive civilians produced by the CCF concept. However, by asserting the constraint applied to NIAC belligerents, the proponents of Section IX produced an anomaly that could only be eliminated by asserting that the minimum necessary force requirement applies to *all* enemy belligerents, even traditional combatants. In this regard, it must be emphasized, the DPH Study's concession that application of this constraint will often be impracticable in traditional force on force combat, in no way suggests that the obligation is inapplicable in that context. Instead, Section IX injects another feasible precaution obligation into the use of combat power in any armed conflict. Unfortunately, unlike all other such obligations, which are intended to mitigate the collateral impact on civilians as the result of attacking a lawful objective, the beneficiary of this asserted obligation is the lawful and deliberate object of attack itself.

#### 4.2. Conflating of law and policy

There may be—and indeed often are—policy and operational rationale for imposing a minimum force requirement on government forces combating non-state belligerent groups. Indeed, the history of armed conflict is replete with examples of commanders imposing restraints on their forces in order to achieve some tactical, operational, or strategic objective.<sup>121</sup> But couching

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<sup>119</sup> *Id.* at 82 n.221.

<sup>120</sup> See *supra* note 72 and accompanying text (discussing flawed inferences related to who can be treated as a civilian for DPH purposes).

<sup>121</sup> See Andrew Curry, *Don't Shoot Until You See the Whites of Their Eyes!*, MILITARY CHANNEL, <http://military.discovery.com/history/revolutionary-war/bunker-hill/bunker-hill-2.html> (last visited Nov. 19, 2011) (noting that the colonial armies forced delay in opening fire in order to maximize British casualties).

the requirement as a legal constraint at best conflates *lex lata* and *de lege ferenda*.<sup>122</sup> At worse, the conflation, while cloaked in terms of humanity, will add uncertainty in the already complex NIAC environment and, ultimately, result in increased civilian casualties. The conflation also confuses the differing considerations through which the use of force is limited: legal, policy, and operational.

While the term "rules of engagement" (ROE) is commonly misunderstood to mean the laws of armed conflict (LOAC), the ROE are a subset of the LOAC. The LOAC forms the outer, and legal, bounds of permissible conduct in hostilities. Those parameters are further reduced, not legally, but through a host of policy considerations, including political and diplomatic.<sup>123</sup> Military commanders also impose restraints and limitations on their forces.<sup>124</sup> The results of limiting conduct due to policy and operational considerations are the ROE. But to contend that because the ROE are a subset of the LOAC and that the ROE contain limitations on the use of force means the limitations derive from the LOAC is a sophism.

The practice of policy and operationally based limitations on what the LOAC would otherwise permit is not limited to operations against unconventional threats in a NIAC. Yet,

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during the early stages of the American Revolution); *see also* HEADQUARTERS DEP'T OF THE ARMY, FM3-24 COUNTERINSURGENCY ch.1, at 5-12 (2006) (discussing the moral and strategic need for restraint in counterinsurgency operations, such as the need to avoid turning the populace against the counterinsurgency effort due to collateral or intentional injuries to innocents).

<sup>122</sup> In other words, conflating what the law is with what the law should be. *See "Beck's Law Dictionary": A Compendium of International Law Terms and Phrases*, [http://people.virginia.edu/~rjb3v/latin.html#lex lata](http://people.virginia.edu/~rjb3v/latin.html#lex%20lata) (last visited Nov. 19, 2011).

<sup>123</sup> *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01A, STANDING RULES OF ENGAGEMENT FOR US FORCES (Jan. 15, 2000) (establishing guidelines for the use of force by U.S. forces operating in different environments). The standing rules of engagement, or "SROE," provide an example of how rules of engagement reflect LOAC, but also operational and policy constraints.

<sup>124</sup> For example, successive commanders of NATO's International Security Assistance Force in Afghanistan have issued a "tactical directive" which limited where and under what circumstances coalition militaries may use force. The version General Stan McChrystal issued is notable for its limitations on the use of airstrikes. Memorandum from the Headquarters of the NATO Int'l Security Assistance Force (July 6, 2009), *available at* [http://www.nato.int/isaf/docu/official\\_texts/Tactical\\_Directive\\_090706.pdf](http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf). *See also* Curry, *supra* note 121 (recalling how colonial armies would purposely delay opening fire in an effort to maximize British casualties during the American Revolution); HEADQUARTERS DEP'T OF THE ARMY, *supra* note 121, at 5-12 (discussing the need and reasons for restraint in counterinsurgency operations).

however broadly they may be applied in the spectrum of conflicts, these considerations do not justify transforming policy constraints into a general legal obligation. The ability to deliberately attack enemy belligerents with the full force of combat power available for mission accomplishment—an authority that implicitly allows the use of deadly force as a measure of first resort—is an essential aspect of armed hostilities between organized belligerent groups. Indeed, the ability to mass the effects of combat power at the decisive place and time often contributes to accelerating enemy capitulation, thereby sparing many enemy belligerents who might otherwise be subject to a loss of life even if a minimum necessary force obligation were applied.

Admittedly, the complexity borne of government forces operating in a NIAC—where the need to use deadly force as opposed to minimum force is unclear and will vary from person to person—cannot be eliminated. But this dilemma is not newly discovered. Indeed, as this Article has acknowledged, there are circumstances when a minimal force requirement may be appropriate, as in the case of the civilian who directly participates in hostilities. Again, such targeting is based on conduct and not a presumption of offensiveness stemming from membership status in a belligerent armed group. While there may be a legal and policy basis for requiring government forces to employ the minimum necessary force in certain circumstances in an NIAC, to extend a minimum force requirement to include members of belligerent armed groups is both logically and operationally inconsistent, dilutes the concept and protections of a civilian, and further encourages non-compliance with the LOAC.

##### 5. MAINTAINING DISTINCTION INTEGRITY IN THE APPLICATION OF THE CCF TEST

There is a rational way to reconcile Section IX with status based targeting presumptions: maintain the distinction integrity. Acknowledging that NIAC involves armed hostilities between competing belligerent groups is a critical first step in doing so, and the DPH Study makes an important contribution.<sup>125</sup> However, this must be accompanied by an additional acknowledgment: *all*

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<sup>125</sup> See Melzer, *supra* note 2, at 27–28 (“[C]ivilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.”).

belligerent operatives—those involved in IAC and NIAC—are subject to status based targeting authority. This acknowledgment must then lead to the critical conclusion that Section IX cannot properly be applied to any belligerent, including those identified by their CCF in a NIAC.

Recognizing a bright line between genuine civilians—even those who deviate from their presumptive inoffensiveness by taking a direct part in hostilities—and belligerents will effectively preserve the critical distinction between conduct and status based targeting. Only belligerents will be subjected to status based targeting. This is a necessary aspect of armed conflict, because broad targeting authority is premised on the conclusion that the object of attack is not acting as an individual agent, but instead executing the will of belligerent leadership. It is obvious that this presumption is at times overbroad. It is a necessary (and at times unfortunate) aspect of armed conflict that enemy belligerents may be killed when capture may have been a viable alternative, or even when they present no actual risk to the attacking force. This is a consequence of status based targeting authority derived from the presumption of threat triggered by the status determination. That authority terminates only when the enemy belligerent is effectively separated from this subordinate agent derived presumption through incapacity or surrender.<sup>126</sup>

This status based targeting authority is triggered by the determination that an individual is a member of an opposition belligerent group. It is generally assumed that this determination will be relatively uncomplicated in the IAC context due to the expectation that enemy belligerents will wear distinctive uniforms. However, even during IAC this is not always true. One need only consider the Taliban armed forces whose appearance was generally indistinguishable from the civilian population, or unconventional forces in Iraq who discarded their uniforms in order to appear to be civilians, as examples of this reality.<sup>127</sup> However, NIAC will almost always involve hostilities with at least one party to the

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<sup>126</sup> COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 482 (remarking that “no person *hors de combat*” may be deliberately attacked, which derives from the “principle of the law of war that those who do not participate in the hostilities [should] not be attacked”).

<sup>127</sup> See *Life in Afghanistan: Taliban Soldiers*, GUARDIANUNLIMITED, <http://www.guardian.co.uk/pictures/image/0,8543,-10304255641,00.html> (last visited Nov. 19, 2011) (displaying an image of Taliban soldiers in civilian clothing).

conflict that is unlikely to don distinctive uniforms as an asymmetrical tactic to capitalize on opposition concerns over targeting civilians in error or because of the absence of any legal incentive to distinguish themselves from the population. As a result, conduct will increasingly become the key threat/status identification criterion. This much is acknowledged by the DPH Study's discussion of CCF in the NIAC context.<sup>128</sup>

Properly understood, CCF in NIAC is therefore neither synonymous with DPH, nor a means of determining when a civilian is engaged in DPH. Instead, CCF is a method for determining belligerent status, with all the consequences that flow therefrom. Whether CCF produces the same outcome in IAC is unclear from the Study. CCF unquestionably results in a loss of protection from an attack. However, because IAC involves hostilities between lawful combatants—who must satisfy legally defined qualification requirements to obtain that status<sup>129</sup>—CCF does not result in lawful belligerent status.<sup>130</sup> Furthermore, because the concept of an unprivileged belligerent in the context of IAC is generally rejected (although not universally), individuals engaging in a CCF in IAC must, by default, remain in the category of civilian, albeit with a loss of protection from attack and lack of combatant immunity.<sup>131</sup>

Applying a proportionality constraint to protect these individuals is therefore fundamentally different than applying it to their NIAC counterparts. This is because in the IAC context, CCF is not a status determination equation, but instead a conduct based criterion leading to the loss of protection from attack.<sup>132</sup> Nonetheless, the individual who loses that protection, while

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<sup>128</sup> See Melzer, *supra* note 2, at 33–36 (positing that membership to an armed group “must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole”).

<sup>129</sup> See Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 14, art. 4 (defining the various categories of persons who can be deemed Prisoners of War).

<sup>130</sup> CCF does not require that an individual satisfy the four requirements in the 3<sup>rd</sup> Geneva Convention, but merely requires that they be involved in a belligerent group on more than just a “spontaneous, sporadic or unorganized basis.” Melzer, *supra* note 2, at 35.

<sup>131</sup> See Melzer, *supra* note 2, at 39 (“Where such personnel directly participate in hostilities without the express or tacit authorization of the state party to the conflict, they remain civilians and lose their protection against direct attack for such time as their direct participation lasts.”).

<sup>132</sup> *Id.*

subject to attack, remains in the category of civilian. Because of this, it is not illogical to assert that any response to such a threat must be qualified by a minimum necessary force limitation. This is because, as civilians, these individuals are not subject to status based targeting, but continue to benefit from the use of force limitations inherent in conduct based targeting authority.<sup>133</sup> First, use of force is justified only when the individual's conduct is sufficient to rebut the presumption of inoffensiveness; the apparent purpose of the CCF test.<sup>134</sup> Second, the sole purpose of a responsive use of force is to restore the civilian to a condition of inoffensiveness, and not to permanently disable the individual's ability to execute the will of enemy belligerent leadership, or to influence the future conduct of the enemy belligerent leadership.<sup>135</sup> Accordingly, if measures short of deadly force can effectively achieve that limited purpose, resorting to deadly force as a measure of first resort would exceed the conduct based authority triggered by the DPH.<sup>136</sup>

#### *5.1. Organized Belligerents: Agents of Leadership Will*

Armed conflict, by its very nature, is a contest between armed groups. Accordingly, the efficacy of the law that regulates armed conflict is contingent on the recognition of this reality. Treating non-state operatives as a conglomeration of civilians taking a direct part in hostilities might, in the abstract, seem like an appealing response to addressing legal authorities related to such conflicts, but it fails to account for the collective/corporate nature of armed conflict. The defining distinguishing factor between a true civilian and a member of a belligerent group is subordination to the will of

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<sup>133</sup> See Protocol I, *supra* note 1, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 618 ("The immunity afforded individual civilians is subject to . . . their abstaining from all hostile acts.").

<sup>134</sup> See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 618 ("Thus a civilian who takes part in armed combat . . . thereby becomes a legitimate target, though only for as long as he takes part in hostilities."); Melzer, *supra* note 2, at 33 (defining the criterion for the "continuous combat function" test).

<sup>135</sup> This is evidenced through the limited scope of authority granted in Article 51. See COMMENTARY ON 1977 ADDITIONAL PROTOCOLS, *supra* note 13, at 615-28.

<sup>136</sup> See Melzer, *supra* note 2, at 82 (discussing how it is against "basic notions of humanity to kill an adversary . . . where there manifestly is no necessity for the use of lethal force").

belligerent leadership. Whether the result of voluntary choice, or obligatory service, belligerent operatives do not act as autonomous agents in armed conflict. Instead, they execute the will of belligerent leadership.

As noted above, the traditional LOAC targeting framework acknowledges this reality by permitting presumptive based uses of deadly force. Once an individual is identified as a member of an enemy belligerent group, friendly forces are entitled to presume the individual represents a hostile threat. However, perhaps even more importantly, friendly forces act in order to disable the ability of the enemy belligerent operative from executing the will of enemy leadership. In so doing, not only is the belligerent threat eliminated, but the corporate capacity of the enemy is degraded.

It has become too simple to assume that the direct participation in the hostilities equation proposed by the ICRC Study is an adequate substitute for this traditional targeting authority. That equation, while certainly an important component in addressing the threat posed by true civilians who engage in a continuous combat function, does not provide as coextensive a targeting authority as the belligerent status based targeting equation. First, it is based on a requirement to assess each targeting decision through the lens of an individualized actual threat.<sup>137</sup> While the CCF concept may expand the range of conduct that qualifies as such a threat, it is nonetheless a conduct based targeting equation. This fails to account for the need for presumptive based targeting. Second, its almost unitary focus on individualized threat assessment fails to account for the legitimate use of attacking belligerent operatives in order to influence belligerent leadership, not merely to eliminate an individual threat.<sup>138</sup>

Applying status based targeting authority to NIAC eliminates these flaws. That targeting authority is derived from the determination that individuals qualify as members of opposition belligerent groups. This determination is unquestionably complex. Furthermore, in the NIAC context it will often be based on an assessment of conduct, for the simple reason that more objective criteria—like uniforms or specialized military equipment—will be unavailable. However, even when status threat recognition is based on similar, if not identical, factors as those at the core of the

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<sup>137</sup> See *id.* at 43 (noting the necessity of pointing to “specific acts” when establishing “direct participation”).

<sup>138</sup> See *id.* (focusing solely on individual participation in hostilities).

CCF test, the sum of the analysis is not a determination of conduct based targeting authority. In short, conduct may be the test for status, but conduct derived status does not trigger conduct based targeting authority.

Why, if the equation used for CCF and status determinations is analogous, is this distinction even necessary? This is a logical question, but one that reveals a disconnect between legal theory and operational reality. Treating non-state belligerent operatives as civilians who lose protection from attack for such time, as they take a direct part in hostilities, even under the expanded CCF test, grants them an unjustified windfall. This is because it inverts the traditional targeting presumptions associated with armed conflict. This approach places the burden of validating individualized actual threat on the opposing belligerent operative. This burden allocation is justified when the friendly operative encounters a civilian with no subordinate relationship to enemy belligerent leadership. However, it is unjustified when encountering enemy belligerent operatives. As noted above, imposing validation of actual threat as the condition precedent to targeting members of enemy belligerent groups degrades combat initiative, produces dangerous hesitation, and ultimately provides greater protection for the non-state operative than for the lawful belligerent. Indeed, this latter consequence seems especially oxymoronic. Why should a fighter without the privilege of operating on behalf of a state benefit from greater protection than his legitimate counterpart?

The only plausible answer to this question is that such an outcome is a necessary consequence of the inherent uncertainty as to who is a civilian and who is a non-state belligerent operative. Applying a unitary conduct based targeting equation to all non-regular armed forces mitigates the risk of erroneous targeting resulting from this uncertainty. Accordingly, any additional protection afforded by the non-state actor is an incidental outcome of a rule intended to maximize protection for true civilians. The more rational response to this uncertainty—at least from an operational perspective—is to develop credible and effective status recognition criteria. Ultimately, if conduct based status determinations are based on criteria relatively analogous to the CCF test, it should be equally effective in mitigating the risk of targeting errors. However, once that status is established, it would trigger targeting authority traditionally relied upon to bring enemy armed forces into submission as efficiently as possible. It will also



protect friendly forces from the risk associated with treating enemy operatives as presumptive civilians.

## 6. CONCLUSION

The concept of Continuous Combat Function in the ICRCs Direct Participation in Hostilities Study represents an important step in clarifying when civilians lose their protection from deliberate attack. However, this test was not, and should not be considered the controlling methodology for determining when non-state belligerent operatives may be lawfully attacked. Instead, that determination must be made based on a determination of belligerent status; a determination that triggers a broader targeting authority than CCF and properly allocates risk between competing belligerent forces.

Unfortunately, it is increasingly common to assert that non-state belligerents are merely civilians directly participating in hostilities. CCF is then relied upon as a logical solution to target legality decisions when engaged in hostilities against non-state groups. This is a dangerous trend. CCF is linked to the direct participation in hostilities qualifier to LOAC civilian protection from deliberate attack. Because of this, it—like the protection it qualifies—is not a method for determining enemy belligerent targetability. Instead, it must be confined to assessing when a true civilian, an individual acting autonomously and not executing the will of belligerent leadership, loses protection from attack.

If CCF is confined to this context, it is a logical step forward in the LOAC. While not a perfect solution to the challenge of dealing with civilians who engage in conduct inconsistent with their LOAC derived protections, it at least acknowledges the reality that such conduct is not restricted to raising a rifle and pulling the trigger. Even the Section IX concept—that armed forces may use only minimum necessary force when encountering a civilian who has engaged in CCF and therefore must detain when feasible—is acceptable if limited to the autonomous civilian actor. But if extended to define when members of non-state belligerent groups may be attacked, the rule loses credibility.

Conflicts between organized non-state groups and State armed forces are unlikely to abate in the foreseeable future. Indeed, what is far more likely is that the definition of non-international armed conflict, and the security challenges to the State that compel policy-makers to invoke LOAC authority in response to non-state threats,

will continue to become more complex. Ultimately, however, armed conflict must be conceived as a contest between organized groups. Deviating from this conception undermines the entire authority/obligation framework of the law. The direct participation in hostilities cannot be a substitute for the reality that armed conflict is a contest between organizations, not a contest between one organization and a conglomerate of like-minded autonomous actors. Armed conflicts—even against the most evasive and loosely organized enemy—are therefore not a one sided combatant COIN.